

New rules in Belgian income tax law for tax haven payments:

By Program Law of December 23, 2009, a new provision for payments to tax havens has been introduced in Belgian income tax law.

Summary

In summary, as from January 1, 2010, Belgian taxpayers (companies and branches of foreign entities) must report substantial payments to tax havens. Furthermore, taxpayers making these payments must be able to prove the existence of sound business reasons, needed to guarantee the tax deductibility of expenses. There are however other existing provisions in Belgian tax law, that also require the taxpayer to prove his sound business reasons for making a particular expense. This is for example the case for interest payments¹. It can therefore be expected that specifically in case of interest paid by Belgian companies or branches to tax havens, the impact of the new rules, in principle, will be limited. However, on the other hand, it can also be expected that the new provision will lead to an increased scrutiny of these transactions by the Belgian tax authorities.

Obligation to report payments

As from January 1, 2010, direct or indirect² payments made by Belgian companies or branches to persons “established” in a *tax haven* (see below), have to be reported in a separated form attached to the corporate and non-resident corporate income tax return³.

Although the word “person” is not defined in the Belgian income tax code (BITC), art. 3 of the Belgian OECD standard model convention states that “person” includes “companies, individuals or any other body of persons”.

Whether the new rules also cover payments to individuals residing in a tax haven, is however still being debated by legal scholars⁴. Reason for this debate is that the word “established”, as used in the new law provision, can in principle only apply to companies and branches. Reading however the new law provision together with the wording as used in article 2 of the BITC, may lead to the conclusion that, in principle, also payments to individuals are covered.

This conclusion is confirmed by the new form.

¹ According to art. 54 BITC e.g. interest payments to a company or branch established in a tax haven do not qualify as professional expense, unless the taxpayer proves that the payments are based on sound business reasons.

² For example by intermediary taxpayers receiving the payments in own name, but for the account of a company established in a tax haven.

³ Reporting obligation in a so-called ‘form 275 F’ as published and clarified in a Royal Decree of 7 Mai 2010

⁴ P. Smet, “Betalingen aan belastingparadijzen: nog veel onduidelijkheden”, *Fiscooloog* 2009, n° 1185, 1

The reporting obligation is limited to payments of 100.000 EUR or more, per tax year. According to a strict reading of the law, the new reporting obligation is not limited to professional expenses⁵, meaning that for example also dividend payments, which are not deductible in Belgium, are covered.

In a fair interpretation of the law, it is assumed that the new obligation only applies to ordinary payments (directly or indirectly) to affiliated persons. It is assumed that payments on listed bonds for example are not covered. After all, in such a scenario, the taxpayer cannot be expected to have information regarding the identity of the ultimate beneficiary.

Additional condition to deduct payments, qualifying as professional expense

Failure to report payments to tax havens⁶ *that qualify as professional expenses* for the Belgian taxpayer, will lead to the refusal of the (tax) deductibility of these expenses. In a worst case scenario, an additional fine and tax increase could be imposed.

Failure to report payments that don't *qualify as professional expenses* (e.g. dividend payments) can only result in a fine and tax increase.

On the other hand, the fact that the new reporting obligation has been respected does not necessarily imply that the Belgian tax authorities will accept that the payments are tax deductible as professional expenses. According to the new rules⁷, the taxpayer must prove that the payment was motivated by *sound business reasons* (i.e. the non - artificial character of the transaction giving raise to the payments and taxpayers involved).

Tax haven: definition

Under the new regulation⁸, *tax havens* are defined as:

a) *Countries where the nominal tax rate is less than 10%;*

or

b) *Countries not respecting the minimum OECD standard on transparency and information exchange.*

⁵ Like interest payments, director fee payments or payments for services rendered etc.

⁶ Although the law text is only making reference to payments to tax haven *countries*, it is assumed that the Belgian legislator envisaged payments to *persons* (i.e. *companies and individuals*), established in tax haven countries.

⁷ i.e. art. 49; 53, 10°; 54, 57, 198, 11° and 219 BITC

⁸ Please note that the Belgian income tax code has multiple definitions of the notion "tax haven". By consequence, the definition of "tax haven" in the context of the newly introduced reporting obligation is not fully the same as the notion used (as an anti-abuse rule) for the Belgian participation exemption on dividends received.

Very recently, a final list of 30 jurisdictions qualifying as a tax haven under the new rules has been published in a Royal Decree⁹. The government furthermore announced its intent to update the list regularly (every 2 years).

Countries currently listed, are: the United Arab Emirates (Abu Dhabi, Ajman, Dubai, Fujairah, Ras al Khaimah, Sharjah, Umm al Qaiwain), Anguilla, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Saint-Barthélemy, Turkish and Caicos Islands, Andorra, Guernsey, Jersey, Jethou, Isle of Man, Moldova, Montenegro, Monaco, Sark, Bahrain, Maldives, Micronesia, Nauru, Palau, Vanuatu and Wallis-and- Futura¹⁰.

It is remarkable that the Principality of Liechtenstein is not on the list.

Payments made to persons, residing or established in a country, *not* mentioned in the approved list¹¹, are not subject to the new rules. However, this does not necessarily mean that the tax deductibility of the professional expense will be accepted. The general deductibility provisions (of art. 49, 54, 57 & 198 BITC) and the "at arm's length"- rules remain applicable as before.

Please note that a circular letter from the tax authorities, clarifying certain issues is to be expected before the end of September 2010¹².

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⁹ Royal Decree of 6 Mai 2010 confirming the provisional list as approved by the Council of Ministers on 27 January 2010

¹⁰ This list has been implemented in Art. 179 RD/BITC

¹¹ As in force on January, 1 of the tax assessment year

¹² Parliamentary question n° 363 of 25 January 2010 by Mr. Brotcorne